

**RUBIN, WINSTON, DIERCKS, HARRIS & COOKE**

ATTORNEYS AT LAW

TENTH FLOOR

1333 NEW HAMPSHIRE AVENUE, N.W.

WASHINGTON, D.C. 20036

(202) 861-0870

FAX: (202) 429-0657

**RECEIVED**

**AUG 29 1995**

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY**

August 29, 1995

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: Opposition of Ackerley to Joint Application for Review

Dear Mr. Caton:

Transmitted herewith on behalf of Ackerley Communications Group, Inc. is the original Opposition of Ackerley to Joint Application for Review and 10 copies of this document.

Also, please find enclosed an additional copy of this document which should be file-stamped and returned to the Action Courier.

If you have any questions or comments concerning the enclosed materials, please contact the undersigned.

Sincerely,



Rena I. Curtis

WED:ric  
Enclosures

No. of Copies rec'd \_\_\_\_\_  
List A B C D E

0210

Before the  
**Federal Communications Commission**  
Washington, D.C. 20554

**RECEIVED**

**1 AUG 29 1995**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

**In the Matter of**

**Amendment of Section 73.606(b)     }  
    Table of Allotments           }  
TV Broadcast Stations           }  
(Pueblo, Colorado)            }**

**MM Docket No. 93-191  
RM 8088**

**To: The Commission**

DOCKET FILE COPY ORIGINAL

**OPPOSITION OF ACKERLEY COMMUNICATIONS  
GROUP, INC. TO JOINT APPLICATION FOR REVIEW**

James L. Winston  
Walter E. Diercks  
Rubin, Winston, Diercks,  
Harris & Cooke  
1333 New Hampshire Avenue, N.W.  
Tenth Floor  
Washington, D.C. 20036  
(202) 861-0870

Dated: August 29, 1995

## **SUMMARY OF ARGUMENT**

The University of Southern Colorado (“USC”) and Sangre de Cristo Communications, Inc. (“SCC”) have filed a Joint Application for Review. The Application for Review claims that the NPRM improperly excluded SCC’s unbuilt construction permit on Cheyenne Mountain when it established a proceeding to consider the Channel Swap proposed by USC and SCC. The Application for Review further contends that the Report and Order improperly denied the Consolidation Motion filed by USC and SCC and improperly denied the Channel Swap Petition.

Ackerley Communications Group, Inc. (“KKTv”), licensee of KKTv, a television station licensed to Colorado Springs, Colorado opposes the Application for Review and demonstrates that neither the NPRM nor the Report and Order erred in considering the motions, petitions and applications filed by USC and SCC. KKTv also demonstrates that the Application for Review violates Section 1.115(c) of the Commission’s Rules and should be dismissed.

The Application for Review violates Section 1.115(c) because it relies on questions of fact upon which the designated authority has not been afforded the opportunity to pass. Since USC and SCC had the opportunity to present these facts to the designated authority in their comments in the rulemaking proceeding and failed to do so, the Application for Review cannot be referred to the designated authority for consideration as a petition for reconsideration under Section 1.106(c) of the Commission’s Rules.

The Application for Review complains that the NPRM’s proposal to modify SCC’s license authorization to operate at USC’s current site on Baculite Mesa rather than at the Cheyenne Mountain site specified in USC’s construction permit because USC had failed to construct or operate facilities at the Cheyenne Mountain site. KKTv demonstrates that the NPRM’s action was correct. The Commission has never allowed a permittee to swap facilities where the result is that a permittee has a short spaced site for its transmission facilities. In addition, the waiver of the spacing requirements was based on the unique public interest factors presented by USC’s application for a waiver. Those public interest factors are not present in SCC’s situation. Therefore, allowing SCC

to gain the advantage of a waiver given to USC is not appropriate in a proceeding to consider a channel swap. The various claims of USC and SCC that the Commission is required to give SCC the benefit of the waiver previously given to USC do not withstand scrutiny.

The Application for Review's complaint that the Report and Order erroneously denied the Consolidation Motion is similarly flawed. The various applications of USC and SCC which are the subject of the Consolidation Motion present legal and factual issues which are fundamentally different than those presented by the Channel Swap Petition and consideration of those issues in the Channel Swap proceeding could only delay and confuse consideration of the Channel Swap Petition.

The Application for Review's challenge to the Report and Order's denial of the Channel Swap Petition also misses the mark. In the first instance USC and SCC indicated that SCC was not interested in the Channel Swap Petition as modified by the NPRM. Therefore, the Report and Order correctly held that this lack of continuing interest required denial of the modified Channel Swap Petition. The Channel Swap Petition as originally presented (with SCC obtaining the construction permit on Cheyenne Mountain) also was correctly found not to be in the public interest. The Report and Order correctly found that USC intends to build the translator network regardless of whether the Channel Swap is approved. Thus, any gains in service attributable to these translators could not be attributed to the Channel Swap. In addition, translators are a secondary service which should not be considered in any determination of gains in service which would be created by the Channel Swap. Also, permitting USC to swap its Cheyenne Mountain site with SCC would be to permit USC to renege on its commitment to supply viewers in Colorado Springs with a primary off-air noncommercial service. Finally, the Channel Swap with SCC obtaining the Cheyenne Mountain construction permit would result in a loss of off-air primary commercial service to almost 30,000 viewers-- which *prima facie* is not in the public interest.

The Application for Review is without merit and should be denied.

## **TABLE OF CONTENTS**

	<b><u>Page</u></b>
Summary.....	i
Table of Contents.....	iii
I. Background.....	2
II. Questions Presented For Review.....	5
III. The Application for Review Violates Section 1.115(c) of the Commision’s Rules.....	5
IV. The NPRM Correctly Excluded the Cheyenne Mountain Site.....	6
V. The Consolidation Motion Was Correctly Denied.....	13
VI. The Channel Swap Was Not in the Public Interest and Was Correctly Denied.....	17
VII. Conclusion.....	24

Before the  
**Federal Communications Commission**  
Washington, D.C. 20554

**In the Matter of**

**Amendment of Section 73.606(b)**  
**Table of Allotments**  
**TV Broadcast Stations**  
**(Pueblo, Colorado)**

)  
)  
)  
)

**MM Docket No. 93-191**  
**RM 8088**

**To: The Commission**

**OPPOSITION OF ACKERLEY COMMUNICATIONS  
GROUP, INC. TO JOINT APPLICATION FOR REVIEW**

Ackerley Communications Group, Inc. ("KKTV")<sup>1</sup>, by its attorneys and pursuant to Section 1.115 of the Commission's Rules, hereby submits its Opposition to the Joint Application for Review (the "Application for Review") filed by the University of Southern Colorado ("USC")<sup>2</sup> and Sangre de Cristo Communications, Inc. ("SCC")<sup>3</sup> in the above captioned proceeding. The Application for Review seeks review of the decision<sup>4</sup> of the Chief of the Allocations Branch of the Mass Media Bureau's Policy and Rules Division (the "Staff") denying USC's and SCC's joint petition (the "Channel Swap Petition") to exchange their television channel assignments (the "Channel Swap") in the above-captioned rulemaking proceeding and a related Joint Motion to Consolidate Proceedings (the "Consolidation Motion"). For the reasons set forth herein, KKTV submits that the Report and Order properly denied the Channel Swap Petition because the Channel Swap is not in the public interest and properly denied the Consolidation Motion because the other proceedings which are the

---

<sup>1</sup> Ackerley Communications Group, Inc. ("Ackerley") is the licensee of commercial television station KKTV, Channel 11, Colorado Springs, Colorado. KKTV competes with other television stations, including television station KOAA-TV, in the Colorado Springs-Boulder market. Ackerley is the successor-in-interest of KKTV, Inc., which previously filed Comments and Reply Comments in the instant proceeding.

<sup>2</sup> USC is the licensee of noncommercial television station KTSC(TV), Channel \*8, Pueblo, Colorado.

<sup>3</sup> SCC is the licensee of commercial television station KOAA-TV, Channel 5, Pueblo, Colorado.

<sup>4</sup> Report and Order, Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations, (Pueblo, Colorado), MM Docket No. 93-191 (July 14, 1995) (the "Report and Order").

subject of the Consolidation Motion are not germane to the public interest analysis of the Channel Swap proposal. In support of its Opposition, KKTU submits the following:

**I. BACKGROUND**

1. On July 13, 1993, the Commission issued a Notice of Proposed Rulemaking ("NPRM").<sup>5</sup> The NPRM was issued in response to the Channel Swap Petition. In the Channel Swap Petition, USC and SCC requested the issuance of an NPRM which would allow the two stations to exchange channels, pursuant to Section 1.420(h) of the Commission's Rules.

2. In the Channel Swap Petition USC and SCC proposed the following:

- a. USC would provide Channel \*8 to SCC and Channel \*8 would be dereserved;
- b. USC would assign to SCC the unbuilt construction permit which USC obtained for the asserted purpose of moving its transmitting facilities to a Cheyenne Mountain site which would allow USC to better provide noncommercial service to Colorado Springs;
- b. SCC would provide Channel 5 to USC and Channel 5 would be reserved;
- c. SCC would provide financial support to USC;
- d. SCC would donate its translator station K30AA, Colorado Springs, Colorado, to USC; and
- e. SCC would donate the existing licensed facilities of station KOAA-TV to USC.

NPRM at ¶ 3.

3. USC and SCC claimed in their Channel Swap Petition that the following public interest benefits would flow from the proposed channel swap:

- a. The existing transmitting facilities of KOAA-TV would provide a signal superior to the existing facilities of KTSC(TV);
- b. The funds which would be provided to USC could be used to expand USC's existing translator network and allow USC to create additional noncommercial programming;

---

<sup>5</sup> Notice of Proposed Rulemaking, Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations, (Pueblo, Colorado), MM Docket No. 93-191 (released July 13, 1993).

- c. Expansion of USC's translator network allegedly would allow USC to provide first noncommercial educational reception service to approximately 83,000 new viewers in western Colorado, and a new reception service to 299,897 persons. However, the 299,897 persons would consist of a combination of additional persons within the proposed KTSC Grade B contour, persons within the service area of donated translator station K30AA, and persons served by new translator stations to be constructed from a portion of the funds to be provided by SCC; and
- d. The swap would allow KOAA-TV to obtain a long sought after site in Colorado Springs.

NPRM at ¶ 3.

4. The Staff reviewed the proposed Channel Swap and concluded that there were some elements of the proposal which suggested that such a channel swap might be in the public interest. The Staff stated that it would therefore issue an NPRM proposing to allow a channel swap. NPRM at ¶ 6. However, the Staff also stated that it had a number of concerns about the proposed Channel Swap. NPRM at ¶ 7.

5. First, the Staff stated that, because no facilities have been constructed or operated at the site for which USC holds a construction permit on Cheyenne Mountain, it was appropriate to propose modification of SCC's license authorization to operate at USC's currently licensed site on Baculite Mesa, rather than at the site on Cheyenne Mountain specified in the USC construction permit. NPRM at ¶ 7.

6. Second, the Staff stated that it was concerned that USC had been granted a waiver of Sections 73.610 and 73.685 of the Commission's Rules based upon USC's stated need to continue providing noncommercial educational television service to Colorado Springs "...without relying on a translator." NPRM at ¶ 8. The Staff noted that, according to the Channel Swap Petition, shadowing occurs in Colorado Springs from the KOAA-TV/KTSC(TV) licensed sites on Baculite Mesa. The Staff further noted that, contrary to USC's stated intent at the time it obtained the con-

struction permit to move to Cheyenne Mountain, in the Channel Swap Petition USC now proposed to utilize a translator to provide service to the shadowed portions of Colorado Springs if it were allowed to exchange channels with KOAA-TV. The Staff concluded, "...we do not believe it is generally desirable to replace primary service to that community [Colorado Springs], as contemplated in connection with USC's waiver request, with a secondary service which could ultimately be forfeited to a full service television operation...." NPRM at ¶ 8. The NPRM invited comments on this issue. Id.

7. The third area of concern raised by the NPRM was that the vast majority of the alleged service gains shown by USC related solely to its proposed translator network expansion. The NPRM stated that, "...since Commission policy is to treat translators as secondary services for purposes of spectrum priority, USC's projected translator expansion would not be protected against the initiation of a full service facility." NPRM at ¶ 9. The NPRM added:

Thus the projected population gains attributed to USC's proposed operation of translators at Grand Junction, Durango and Colorado Springs may be too speculative to be considered in the context of this rulemaking proceeding. Therefore, we may not consider these gains in conjunction with the overall benefits associated with this proposal.

NPRM at ¶ 9 (emphasis added).

8. Subsequent to the release of the NPRM, USC and SCC filed the Consolidation Motion, requesting the Commission to consolidate with the Channel Swap rulemaking proceeding several other proceedings involving: 1) SCC's application for reinstatement of its construction permit for television translator Station K15BX, Colorado Springs; 2) SCC's application for an extension of time to construct Station K15BX; 3) SCC's application for an extension of its STA to rebroadcast Station KTSC(TV) on television translator Station K15BX; 4) USC's application for an extension of time to construct modified facilities at Cheyenne Mountain; 5) USC's and SCC's application to assign USC's Cheyenne Mountain construction permit to SCC; and 6) four applications for new UHF translators filed by USC.

9. The Report and Order first concluded that the Consolidation Motion should be

denied because the other proceedings were not germane to the Channel Swap under consideration in the rulemaking proceeding. The Report and Order then denied the Channel Swap Petition, finding that the proposed Channel Swap was not in the public interest.

## **II. QUESTIONS PRESENTED FOR REVIEW**

1. Should the Application for Review be dismissed for violating Section 1.115 of the Commission's Rules?
2. Was it error to exclude the Cheyenne Mountain Permit in the rulemaking proceeding?
3. Was it error to deny the Consolidation Motion?
4. Was it error to deny the Channel Swap Petition?

## **III. THE APPLICATION FOR REVIEW VIOLATES SECTION 1.115(C) OF THE COMMISSION'S RULES**

10. Section 1.115(c) of the Commission's Rules clearly and unequivocally states that "[n]o application for review shall be granted if it relies on questions of fact . . . upon which the designated authority has been afforded no opportunity to pass." Despite this clear requirement, the Application for Review relies on an Engineering Statement (Exhibit C to the Application for Review) purporting to present facts which were not presented to the Staff in the instant proceeding.

11. The Engineering Statement purports to address the factual issue of whether claimed service gains to KTSC(TV) to be provided by translators were "too speculative" to be considered. While the Application for Review cites the Report and Order at ¶ 25 as the source of the "too speculative" determination by the Staff, the concern that the inclusion of purported service gains to be provided by translators might be "too speculative" actually was expressed in the NPRM itself at ¶ 9.

12. It thus becomes clear that the question of whether claimed gains in service to be provided by translators were "too speculative" to be considered in the instant proceeding was expressly raised by the NPRM. USC and SCC therefore had ample opportunity to address this issue in their comments and reply comments in this proceeding. They failed to provide the Engineering

Statement in response to the NPRM, and they cannot now attempt to slip new “facts” into this proceeding at the application for review stage. Indeed, the purported new “facts” could not even be considered by the designated authority in a petition for reconsideration because the “facts” do not relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters of “fact.” See Section 1.106(c) of the Commission’s Rules. These are not new “facts” which were not unknown to USC and SCC until after their last opportunity to present such matters and could, with the exercise of ordinary diligence, have been learned prior to such last opportunity, and USC and SCC do not even allege that consideration of the purported new “facts” is required in the public interest. Id.

13. Since the Application for Review clearly relies upon facts which the Staff issuing the Report and Order was not afforded an opportunity to pass, Section 1.115(c) of the Commission’s Rules requires that the Application for Review be denied without further consideration. The Commission does not have the option of considering the Application for Review as a petition for reconsideration and referring the matter to the Staff for action because the Application for Review also does not meet the standards for a petition for reconsideration under Section 1.106(c) of the Commission’s Rules. Therefore, the Application for Review must be summarily dismissed for violating Section 1.115(c).

#### **IV. THE NPRM CORRECTLY EXCLUDED THE CHEYENNE MOUNTAIN SITE**

14. As noted above, the NPRM found that, since USC had failed to construct or operate facilities at the site for which USC holds a construction permit on Cheyenne Mountain, it was appropriate to propose modification of SCC’s license authorization at USC’s currently licensed site on Baculite Mesa, rather than at the site specified in the USC construction permit on Cheyenne Mountain. USC and SCC complain that this action “contravenes statute, regulation, case precedent and policy.” Application for Review at 6. This complaint is unfounded.

15. USC and SCC argue that the Commission has permitted permittees (as distinguished from licensees) to exchange channels and cite Commission precedent to support their contention.

An examination of the cited precedent reveals that neither of the cited Commission actions is relevant to the instant situation.

16. In making their argument, SCC and USC admit that they are citing cases in which the Commission approved the swap of unbuilt stations. Application for Review at 5. Indeed, both cases cited in the Application for Review involved permittees of unbuilt stations.<sup>6</sup> Neither of them involved a licensee of an existing station with a construction permit for short spaced facilities where the licensee failed to even commence construction and the construction permit has expired.<sup>7</sup>

17. SCC and USC attempt to gloss over the fact that USC is attempting to transfer its expired construction permit for a short spaced site to SCC by claiming that the Gary, Indiana and Clermont and Cocoa, Florida cases are “indistinguishable” from the instant case. Application for Review at 5. Nothing could be further from the truth.

18. In Gary, Indiana, the commercial permittee could not have moved its station to the site of the noncommercial permittee, due to the Commission’s minimum spacing requirements. The noncommercial permittee’s site was not short spaced. Thus, after the channel swap was approved in Gary, Indiana, neither the commercial permittee nor the noncommercial permittee was at a short spaced site. Similarly, in Clermont and Cocoa, Florida, the channel swap also resulted in a situation where, after the swap, neither permittee was at a short spaced site. Thus, neither the Gary, Indiana nor the Clermont and Cocoa, Florida case support the Application for Review.

19. SCC and USC also claim, without citation to any authority whatsoever, that, once a short spacing waiver is granted to a noncommercial station after a public interest determination, that

---

<sup>6</sup> Amendment of Section 73.606(b) (Gary, Indiana), MM Docket No. 86-80, RM-5303, 51 FR 30864, published August 26, 1986, petition for recon. dismissed, 1 FCC Rcd 975 (“Gary, Indiana”); Amendment of Section 73.606(b) (Clermont and Cocoa, Florida), 4 FCC Rcd 8320 (1989), recon. denied, 5 FCC Rcd 6566 (1990), aff’d sub. nom., Rainbow Broadcasting Co. v. FCC, 949 F.2d 405 (D.C. Cir. 1991).

<sup>7</sup> USC has filed an application for extension of this expired construction permit. See NPRM at ¶ 7 n. 4. KKTU has opposed this application. The NPRM correctly notes that it is unlikely that SCC’s application meets the Commission’s strict standards for extension of a construction permit. Id.

determination and that waiver are binding on the Commission forever, no matter what happens after the waiver is granted. SCC and USC go so far as to claim, again without any citation to authority, that the doctrine of res judicata requires the Commission to grant a request by SCC for the same short spacing waiver previously granted to USC. Application for Review at 8. SCC and USC then claim that the only factor the Commission can consider when it receives a request for a short spacing waiver is whether there will be objectionable interference to neighboring stations and that the Commission will not consider non-technical factors, such as ownership or programming. Application for Review at 9. SCC and USC also claim that it would be “unconstitutional” for the Commission to consider whether or not a station was commercial or noncommercial in determining whether or not to grant a short spacing waiver. None of these contentions withstands scrutiny.

20. The Commission grants waivers to its minimum distance spacing requirements based on a number of factors, not all of which are limited to the technical question of whether there will be objectionable interference to other stations. The process of considering a request for a waiver of the minimum mileage separation requirements has been described by the Commission as follows:

The Television Table of Assignments was established so that stations in a given community could operate with maximum power and antenna height without creating objectionable interference with other stations. To that end, it was necessary to establish minimum mileage separations. Those spacing requirements presumptively serve the public interest, and applicants seeking waivers to operate from short-spaced sites are required to demonstrate that the public interest will be better served by a waiver in the circumstances presented than by following the terms of the Rule. When a licensee seeks waiver of our spacing rules, we have examined several factors: (1) the unsuitability of the existing site, either in terms of the economic viability of the station, in technical terms, or in a licensee’s inability to reach areas containing a significant number of viewers who lack a service, a network service, or “independent” service; see Roy H. Park B/casting, Inc., 45 RR 2d 1083 (B/c Bureau 1972); WEST, Inc. (WEST-TV), 80 FCC 2d 233 (1980); (2) the magnitude of the short-spacing: compare Clay B/casting Corp., 50 RR 2d 1273, recon. denied, 51 RR 2d 916 (1982) (approval of a five mile shortfall out of 190 required) with West Michigan Telecasters, Inc., 22 FCC 2d 916 (1982), recon. denied, 26 FCC 2d 668 (1970) aff’d, 460 F.2d 883 (D.C. Cir. 1972) (denial of 15 mile shortfall out of 170 required); (3) the nature and extent of the predicted loss of service that would result from a grant of the short-spacing; see Roy H. Park B/casting, Inc., supra; and Blair B/casting of California, Inc., 55 RR 2d 619 (MMB 1984); (4) the aeronautical and environmental benefits and drawbacks of locating a tower in a particular area, see Roy H. Park B/casting, Inc., supra; (5) the concerns, if any, expressed by the licensee(s) to which short-spacing would result, see WEST, Inc., supra; and WCLY-TV, Inc., 16 FCC 2d

506 (Rev. Bd. 1969), review denied, 25 FCC 2d 832 (1970). See generally, Caloosa Television Corp. (Caloosa), 3 FCC Rcd 3656 (1988), recon. denied, 4 FCC Rcd 4762 (1989) (Commission granted waiver where applicant reached 40 percent fewer households than competitor).

Western B/casting Corp. of Puerto Rico, 69 RR 2d 718, 720 (MMB 1991).

21. USC specifically addressed the public interest factors other than the technical interference factor in its "Amendment to Request for Waiver" dated March 7, 1990.<sup>8</sup> In its Amendment to Request for Waiver, USC claimed that its signal to Colorado Springs was inadequate due to shadowing and that its loss of a translator serving Colorado Springs would result in some viewers in Colorado Springs losing over-the-air service from KTSC-TV. USC asserted that:

... Colorado Springs is part of the area which the University of Southern Colorado was created to serve, not only its broadcast station, but also by the various educational and outreach services which the University provides to that area of the State of Colorado.

Amendment to Request for Waiver at 1.

22. USC further contended that it was:

... confronted with the impending loss of the service which it has provided to Colorado Springs, and the financial support from Colorado Springs residents which is of significant importance to the entire broadcast operation. The instant application [for the construction permit for an antenna site on Cheyenne Mountain] appears to be the only possible mechanism for the University to achieve its basic mission to provide educational service to all of the people of this area.

Amendment to Request for Waiver at 1 to 2.

23. Not surprisingly, in the absence of any opposition at that time, the Commission granted a waiver of the separation rules based on the unique facts and arguments articulated by USC.

Indeed, the letter granting the waiver request stated, in pertinent part:

After careful review of your application, we are persuaded that grant of your waiver requests would serve the public interest. The Commission is mindful of the unique role played by many noncommercial television stations in providing public television service to wide areas. You have established that the University serves both the Pueblo and Colorado Springs areas and that it is therefore important that your television station also do so as well.

---

<sup>8</sup> A copy of the Amendment to Waiver Request is part of Exhibit D to Comments of KKTV, Inc. filed in this proceeding and is attached hereto for the Commission's convenience as Exhibit 1.

February 28, 1991 letter from Barbara A. Kresiman to Thomas Aube at 2.<sup>9</sup>

24. Thus, in 1990, USC affirmatively used the public interest considerations presented by its own unique circumstances, including its status as a provider of noncommercial educational programming, as part of its successful effort to achieve a waiver of the minimum spacing requirements. The Commission relied upon those unique circumstances described by USC, including USC's status as a provider of noncommercial educational programming, in deciding to grant a waiver of the minimum separation requirements. Now in their Application for Review, USC and SCC are arguing that these same public interest considerations cannot be considered and that only technical interference can be considered in their effort to gain Commission approval of a scheme where commercial SCC, and not noncommercial USC, will take advantage of the waiver of the minimum spacing requirements.

25. USC and SCC cannot have it both ways. Indeed, the doctrine of "preclusion by inconsistent positions," also known as "judicial estoppel," should be applied here to bar USC and SCC from reversing the position previously taken by USC. Briefly stated, the doctrine of preclusion by inconsistent positions bars a party from making one argument at one point and then later making the opposite and contradictory argument when self interest may suggest a change. See 1B Moore's Federal Practice ¶ 0.405[8]. That is exactly what has happened in this case. In 1990, USC argued that the Commission should consider public interest factors, including the content of its noncommercial programming, in an effort to gain a waiver of the spacing requirements. Now in 1995, after USC previously succeeded in convincing the Commission to adopt its public interest argument and to grant a waiver, USC and SCC now have contradicted USC's former position and claim that it would be illegal for the Commission to consider these public interest factors. USC and SCC should not be permitted to play "fast and loose" with the Commission's processes. The Commission therefore should invoke the doctrine of preclusion by inconsistent positions to bar USC

---

<sup>9</sup> A copy of this letter is part of Exhibit D to Comments of KKTV, Inc. filed in this proceeding and is attached hereto for the Commission's convenience as Exhibit 2.

and SCC from asserting that the Commission cannot consider any public interest factor other than technical interference when determining whether to grant a waiver of the Commission's spacing requirements.

26. The factual bases for the public interest considerations analysis undertaken in a new request for a spacing waiver by SCC also would be fundamentally different than those present when the USC waiver request was considered. Thus, the claim by USC and SCC that a grant of a waiver to SCC is required by the doctrine of res judicata, Application for Review at 6-8, demonstrates a total lack of understanding of both the doctrine of res judicata and the differences between the public interest factors present in the USC and SCC situations. Res judicata prevents relitigation of claims as to either issues of law or fact by the parties to earlier litigation, if such issues could have been raised or determined. It does not apply to the claims of strangers to the earlier litigation or to claims that could not have been raised in the earlier litigation. See generally, 1B Moore's Federal Practice ¶ 0.401. In the instant case, the public interest issues present in a request for a waiver by SCC -- a commercial television station with its own service area and competitors -- could not have been considered in the earlier proceeding considering a waiver request from USC -- a noncommercial educational station with its own service area, financial considerations and claimed obligations to citizens in that part of Colorado. In addition, under the circumstances presented here, SCC should be deemed a "stranger" to the earlier proceeding in which USC requested the waiver for a noncommercial educational station. Therefore, res judicata is not applicable in the instant proceeding.

27. The claim by USC and SCC that it would be "unconstitutional" for the Commission to consider the differences between USC's noncommercial programming and SCC's commercial programming in determining whether to grant a waiver of the separation requirements because the Commission would have to determine that a short spaced noncommercial station will cause less interference than a short spaced commercial station, Application for Review at 11, is preposterous. As demonstrated above, the Commission historically has looked to more than technical interference

when determining whether to grant a waiver of the spacing requirements. See Western Broadcasting Corp. of Puerto Rico, supra. Therefore, contrary to the Application for Review's claim, the Staff is not in the position of claiming that a short spaced noncommercial station will cause less interference than a short spaced commercial station. The reality is that, in the public interest analysis of a request for a waiver of the minimum spacing requirements, it is more than reasonable for the Commission to consider the nature of program obligations, service area, programming needs and program content in determining whether the public interest would be served by permitting a short spaced station. For example, it is reasonable -- and constitutional -- to consider whether a short spaced site would permit viewers to receive a particular type of first service (e.g., noncommercial, commercial network, or commercial independent) they would not otherwise receive. Unlike the situation in City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505 (1993), the Commission is not blindly favoring noncommercial speech over commercial speech with no basis for doing so. Therefore, the First Amendment argument of USC and SCC is without merit.

28. Finally, USC and SCC complain that the Report and Order concluded that, because the Channel Swap involved an amendment to the Table of Television Allotments, standard allotment policies and rules apply equally to channel exchanges and a channel allotment. However, as noted above, USC and SCC cannot point to any Commission precedent for permitting a channel swap involving a construction permit for an unbuilt short spaced facility where, after the swap, a permittee would be at a short spaced site. The Report and Order correctly concluded that "[a]bsent a demonstration of compelling need for departure from established interstation separation standards, the Commission will not grant a waiver of the minimum spacing rules for allotment purposes." Report and Order at ¶ 23.

29. In the final analysis, the claims of USC and SCC that the Staff erred when it held that the Channel Swap rulemaking proceeding should be based on SCC obtaining Channel \*8 located at the present USC site on Baculite Mesa rather than SCC's permitted but unbuilt site on Cheyenne Mountain are erroneous. The Staff decision was correct and the Application for Review should be

denied.

**V. THE CONSOLIDATION MOTION WAS CORRECTLY DENIED**

30. USC and SCC also complain that the Report and Order denied their Consolidation Motion which had requested the Commission to consolidate with the Channel Swap rulemaking proceeding several other proceedings involving SCC, including USC's application to extend its expired construction permit for Cheyenne Mountain, USC's and SCC's application to assign USC's Cheyenne Mountain construction permit to SCC and several SCC applications involving translators. The Report and Order concluded that the factual and legal issues raised by these other application proceedings fell outside the scope of this proceeding and were not germane to the public interest analysis of the channel exchange proceeding. The Report and Order's conclusions are correct and should not be disturbed by the Commission.

31. The Application for Review claims that the issues in the other application proceedings covered by the Consolidation Motion are "legally and factually inseparable" from the Channel Swap Petition. Application for Review at 20. USC and SCC argue that the applications for extension and assignment of the unbuilt Cheyenne Mountain permit in particular should have been consolidated with the Channel Swap Petition. Application for Review at 20-21. The fact that the underlying Channel Swap Petition was denied makes this complaint about the denial of the Consolidation Motion moot. However, to the extent that the Commission considers the complaint that the Consolidation Motion was denied, the Commission should deny the Application for Review and affirm the Report and Order.

32. The Commission need look no further than SCC's application to extend its Cheyenne Mountain construction permit to conclude that the Report and Order correctly found that the applications covered by the Consolidation Motion raised legal and factual issues which fell outside the scope of this proceeding and were not germane to the public interest analysis of the Channel Swap proceeding.

33. The NPRM noted that USC had filed an application for an extension of time within

which to construct the unbuilt facilities of KTSC(TV) on Cheyenne Mountain. The NPRM correctly stated that:

...pursuant to the terms of Section 73.3535(b) of the Commission's Rules, grant of such an extension request requires a showing that either construction is complete and testing is underway; or that substantial progress has been made in the construction of the station; or that reasons clearly beyond the permittee's control prevented construction and that all possible steps have, nevertheless, been taken to resolve the problem and to proceed with construction.

NPRM at ¶ 7, n. 4. In fact, KKTV filed a petition for an order to show cause why the USC construction permit should not be revoked and a petition to deny USC's application for extension of the construction permit. Copies of KKTV's petitions and subsequent pleadings in support of the petitions were attached to Comments of KKTV, Inc. as Exhibit D.

34. In reality, USC did nothing more in its application for extension of time in which to construct than attempt to use the pendency of the proposed Channel Swap to justify its failure to start, no less complete, the facilities authorized by the construction permit. The problem with this argument by USC is that it is contrary to the Commission's Rules and Commission explanations of those rules.

35. In 1985, the Commission promulgated stricter standards for the granting of extensions of construction permits. Construction of Broadcast Stations, 102 FCC2d 1054, 59 RR2d 595 (1985). For example, at that time, the Commission specifically deleted that portion of Section 73.3534 of the Rules that had permitted grants of extensions of construction permits upon a showing of "other matters," such as the pendency of an assignment application and the assignee's ability to quickly construct the station. Community Service Telecasters, Inc., 6 FCC Rcd 6026, 69 RR2d 1608, 1612 (1991).

36. The Commission has explained the effect of these stricter standards for the granting of construction permits as follows:

Specifically, before an extension application can be granted, a permittee must show either that substantial progress has been made in the construction of the station or that reasons clearly beyond its control have prevented construction and that all possible steps have, nevertheless, been taken to resolve the problem and to complete

construction. See 47 CFR §73.3534(b). Similarly, if a permittee finds it necessary to file a modification application or an assignment/transfer application during the second half of the station's specified construction period, the permittee must show "substantial progress" or "reasons clearly beyond the control of the permittee." See 47 CFR §73.3535(b).

Id. 69 RR 2d at 1610 n. 11.

37. In its application for extension of the construction permit, filed almost two years from the date of grant of the construction permit, USC did not offer any explanation for its failure to even start to construct the facilities authorized by the construction permit, other than the proposed Channel Swap. The proposed Channel Swap was not disclosed to the Commission until over 18 months after the construction permit was granted and no explanation was made by USC as to how the pendency of the proposed swap was a reason beyond USC's control which prevented it from even starting construction of the facilities authorized by the construction permit.

38. USC clearly is in the same position as any other permittee which has failed to vigorously pursue construction and then seeks to use the proposed transfer of its construction permit as a justification for the extension of the construction permit. The Commission has repeatedly made it clear that it simply will not accept such an excuse as a justification for the extension of a construction permit. Construction of Broadcast Station, supra; Community Service Telecasters, Inc., 69 RR 2d at 1612; Community Telecasters of Cleveland, Inc., 58 FCC 2d 1296, 36 RR 2d 1609 (1976). The NPRM correctly noted that USC's decision to defer construction must be viewed as a business judgment and not as a situation beyond USC's control. NPRM at ¶ 7 n. 4.

39. This conclusion is reinforced by SCC's questionable history of seeking waivers of the Commission's rules to increase KOAA-TV's coverage of Colorado Springs. On February 26, 1988, SCC filed a request with the Commission seeking to receive the assignment of the construction permit for unbuilt station KPCS(TV), Channel 32, another Pueblo station. SCC attempted to obtain a waiver of the Commission's "duopoly rule," Section 73.3555, to operate KPCS(TV) essentially as a full power translator for KOAA-TV, covering the Colorado Springs area, even though the station is licensed to Pueblo. File No. BAPCT 880226K4, KPCS/SCC Form 314 Application, February 26,

1988. KKTV opposed that application. KKTV Petition to Deny, filed April 8, 1988. The Staff denied this application. tvUSA/Pueblo Ltd., 4 FCC Rcd 598, 65 RR 2d 1550 (M.M.B. 1989). The Commission affirmed that denial. tvUSA/Pueblo Ltd., 5 FCC Rcd 7457, 68 RR 2d 1086 (1990).

40. Now SCC is back with a new scheme, which once again involves a waiver of Commission rules and which again is designed to improve its coverage of Colorado Springs. This time SCC is trying to take advantage of a public interest determination made by the Commission on behalf of a noncommercial television station (KTSC(TV)) to gain a waiver of the minimum distance separation requirements for its commercial television station (KOAA-TV).

41. In the KPCS assignment of construction permit proceeding, SCC repeatedly described the alleged inadequacy of its signal coverage in Colorado Springs. tvUSA/Pueblo Ltd., 65 RR 2d at 1550. In its quest for waiver of the Commission's minimum distance separation requirements, USC has stated that the signal coverages of KOAA-TV and KTSC(TV) from their Baculite Mesa sites suffer from the same shadowing problems in Colorado Springs. USC Amendment to Request for Waiver, a copy of which is attached hereto as Exhibit 1. Now USC proposes to abandon the signal improvement allowed by the construction permit and instead to continue to operate from what USC and SCC have both stated is an inadequate site on Baculite Mesa, with only a translator in Colorado Springs to make up for the allegedly inadequate antenna site.

42. This curious sequence of events strongly suggests that USC and SCC may have planned to enter into the Channel Swap at some time before USC applied for the construction permit and the waiver of the Commission's minimum distance separation requirements. Therefore the NPRM was correct in refusing to allow SCC to circumvent the Commission's rules by using a noncommercial station as a "stalking horse" to obtain a waiver of the rules when that waiver will not be used by the noncommercial station.

43. This brief exposition demonstrates that USC's application to extend the Cheyenne Mountain construction permit raises factual and legal issues which have absolutely nothing to do with the merits of the Channel Swap Petition. The other applications which were covered by the

Consolidation Motion also raise a host of issues which are not germane to the Channel Swap Petition. Inclusion of these other applications by USC and SCC would not further the consideration of the Channel Swap Petition in any way and could only serve to confuse and delay consideration of the Channel Swap Petition. Therefore, the Report and Order correctly denied the Consolidation Motion

**VI. THE CHANNEL SWAP WAS NOT IN THE PUBLIC INTEREST AND WAS CORRECTLY DENIED**

44. A remarkable -- and telling -- feature of the Application for Review is that less than 7 of its 24 pages are directed to the fundamental question of whether the Report and Order erroneously denied the Channel Swap Petition. The simple fact that the Application for Review spends so little time on addressing the merits of the denial of the Channel Swap Petition speaks volumes about the lack of merit of the Application for Review.

45. In a desperate attempt to justify the unjustifiable, USC and SCC posit four public "benefits" which they claim would result if the Channel Swap were approved:

1. Money and equipment given to USC by SCC;
2. Alleged gains in service provided by USC;
3. Alleged benefits to SCC; and
4. "Public support" for the Channel Swap.

None of these alleged public "benefits" withstands scrutiny.

46. The first and fourth alleged benefits are most easily disposed of. The Commission clearly is not acting in the public interest if it finds that it should approve a channel swap just because the entity operating a noncommercial station will receive cash and equipment in exchange for its channel. Similarly, the Commission should not approve a channel swap merely because USC and SCC -- television stations with the perceived ability to reward their friends and to punish their enemies -- succeeded in persuading some chamber of commerce presidents and some elected officials to write letters supporting the swap. The Commission cannot delegate its job of

determining whether a channel exchange is in the public interest to the presidents of local chambers of commerce and to elected officials, as urged by USC and SCC. Application for Review at 20.

47. The principal question before the Commission is whether the viewing public -- the people who will gain or lose primary over-the-air television service -- will be benefited by the proposed Channel Swap. The Report and Order examined this issue and correctly made two conclusions. First, it concluded that the meager service gains which would be obtained by including the Cheyenne Mountain construction permit in the proposed Channel Swap fell far short of the benefits which the Commission has required in order to grant a short spaced allotment. Report and Order at ¶ 26. Second, the Report and Order correctly noted that SCC and USC had stated that SCC's continued interest in the Channel Swap was conditioned on the inclusion of the Cheyenne Mountain permit in the Channel Swap. In light of the petitioners' stated lack of interest in the Channel Swap proposal as set forth in the NPRM (which excluded the Cheyenne Mountain construction permit) there was no need to consider whether the NPRM proposal was in the public interest. Report and Order at ¶ 27.

48. USC and SCC complain that the Report and Order erred in concluding that the proposed service gains in the Channel Swap including the Cheyenne Mountain permit were insubstantial based in part on the conclusion that translator service was a secondary service which could be displaced. Application for Review at 15. This complaint is inaccurate and disingenuous.

49. In the first instance, the Report and Order correctly noted that USC had decided to go forward with a plan for translators on the Western Slope of the Rockies independent of the proposed Channel Swap. Since USC intends to implement a translator plan for the Western Slope regardless of whether the Channel Swap is approved, it is absurd to argue, as USC and SCC do, that service gains claimed for the translator plan should be attributed to the Channel Swap. Since the translator service to the Western Slope is not dependent on the Channel Swap and will occur even if the Channel Swap proposal is denied, it clearly was correct for the Report and Order to conclude that any such service gains should not be considered as attributable to the proposed Channel Swap. The

Application for Review does not contest the factual statements made in the Report and Order in this regard and does not contest the legal conclusion made in the Report and Order. This acceptance by USC and SCC of the Report and Order's findings of fact and conclusions of law on this critical point is in itself sufficient to mandate a denial of the Application for Review. But there is still more support for the Report and Order's conclusions.

50. The Report and Order then made the correct observations that translator service is a secondary service, Report and Order at ¶ 26, and that translators can be displaced by full power stations. Report and Order at ¶ 24. The Application for Review complains vigorously that it is not true that the translators are in actual danger of being so displaced and that the gains in service which will be obtained by the use of translators are dramatic and in the public interest. In doing so the Application for Review makes several fundamental errors.

51. In the first instance, the Application for Review relies on "facts" contained in an Engineering Statement which was not presented to the Staff prior to the release of the Report and Order. As fully explained in ¶¶ 10 to 13 supra, these additional "facts" simply cannot be considered because there is no excuse for their not having been previously presented to the Staff. See Sections 1.115(c) and 1.106(c) of the Commission's Rules.

52. Second, the Application for Review's argument that the Commission should pretend that translator service is not a secondary service vulnerable to displacement ignores the Commission's Rules. Section 74.702(b) of the Commission's Rules specifically provides that changes in the existing Table of Allotments may be made without regard to existing television translator stations and that when such changes result in initiation of service which results in interference to reception of the signal of a full service station, the licensee of the interfering translator station must eliminate the interference or file an application for a change in frequency.

53. Third, the protestations that translator service in Colorado is not likely to be displaced and should be considered the same as primary service overlooks a highly significant fact which refutes the argument: USC told the FCC when it applied for its short spaced Cheyenne Mountain

site that it was doing so because its translator serving Colorado Springs was to be displaced by a new full-power television station authorized by the Commission to operate on Channel 53 at Castle Rock, Colorado! See Amendment to Request for Waiver of USC dated March 7, 1990 at 1. Thus, USC's own recent experience which led it to seek the short spaced Cheyenne Mountain site was its loss of a translator -- an event USC and SCC now claim in their Application for Review is "very remote." Since USC has recently experienced the loss of a translator in Colorado, there could not be a more graphic demonstration of the accuracy of the conclusions of the Report and Order that translator service is a secondary service which cannot be considered equivalent to primary service for the simple reason that translator service is vulnerable to being displaced by a full-power station.

54. There is a fourth factor which conclusively demonstrates that the Channel Swap is not in the public interest, even if the Channel Swap were to include SCC's use of USC's permit site on Cheyenne Mountain: permitting SCC to use the Cheyenne Mountain site would result in greater public interest injury than that which would occur if the channel swap were permitted as proposed in the NPRM (i.e., with SCC operating from USC's current site on Baculite Mesa).

55. The Commission specifically permits a commercial television station and a noncommercial television station to jointly petition the Commission for a rulemaking proceeding to amend the Television Table of Allotments to exchange channels. However, Section 1.420(h) of the Commission's Rules requires that the Commission find that such an exchange will promote the public interest, convenience and necessity.

56. The Commission has identified factors which will be considered during the review of any such channel exchange proposal. Specifically, the Commission has stated that the parties to an exchange may benefit because the exchange will result in:

- a) More appropriate site or service area locations,
- b) Cost savings, or
- c) Financial advantages that permit them to improve quality of facilities or, in marginal cases, to institute broadcast operations where it would not otherwise be possible.